IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 471 of 2006

Mr.Suresh Prabhu .. Petitioner

versus

Bombay Mercantile Co-op Bank Ltd.

& ors. .. Respondents

...

Mr.Harish Pandya with Kamlesh Patel and Ms.Anuradha Dumbre i/b Joy Legal Consultants for the petitioner.

Ms.Mamta Sadh with Mr.T.N. Tripathi i/b T.N. Tripathi & Co. for respondent no.1.

CORAM : D.G. KARNIK,J.

DATED : 1st March 2007.

P.C.:

1. Heard learned counsel for the petitioner and respondent no.1. None present for the other

respondents.

2. By this petition under section 34 of the Arbitration and Conciliation Act 1996 (for short 'the Arbitration Act") the petitioner challenges the legality and validity of the interim award dated 8th May 2006 and the final award dated 31st July 2006 passed by the learned arbitrator under section 84 of the Multi State Co-operative Societies Act, 2002.

3. The respondent no.2 is a company incorporated and registered under the Companies Act 1956. The petitioner and respondent nos.3 and 4 were the directors of the respondent no.2 company. Respondent no.2 approached the respondent no.1 bank, which is a Multi State Co-operative Bank, for loans. Accordingly, the respondent no.2 was granted two term loans, one for Rs.77 lakhs and another for Rs.40 lakhs subject to the condition that petitioner and respondent nos.3 and 5 stood as guarantors for the repayment of one of the term loans i.e. the loan of Rs.77 lakhs. According to the respondent no.1, the petitioner and the respondent nos.3 to 5 stood guarantors and executed a deed of guarantee on

12th July 1995. As the respondent no.2 failed and neglected to repay the loan the respondent no.1, by its Advocates notice dated 18th May 2004, demanded re-payment from the respondent no.2 as the principal debtor as well as from the petitioner and respondent nos.2 to 5 as guarantors. On their failure to repay the loans, the respondent no.1 commenced the arbitration proceedings for recovery of money in accordance with the provisions of Multi State Co-operative Societies Act.

4. The petitioner contested the claim of the respondent no.1 before the learned arbitrator. He inter alia contended that he had not executed the deed of guarantee, and that the alleged deed of guarantee was not properly stamped and was not admissible in evidence. He also contended that he had resigned the directorship of the respondent no.2 company and along with the resignation, he had requested the bank to terminate the guarantee. He had ceased to be a guarantor. He further objected to the jurisdiction of the learned arbitrator and contended that he was not a member of respondent no.1 bank and therefore, the learned arbitrator had no jurisdiction to arbitrate under section 84 of the

Multi State Co-operative Societies Act.

5. The petitioner filed an application on 17th December 2005 before the arbitral tribunal and prayed for a declaration that the arbitral tribunal had no jurisdiction to entertain and try the dispute as the petitioner was not a member. He also raised a plea of limitation. By the interim award dated 8th May 2006, the learned arbitrator rejected the petitioner's application and by the final award dated 31st July 2006, it directed the petitioner and respondent nos.2 to 5 to jointly and severally pay the amount claimed. That award is impugned in this petition.

6. Perusal of the written statement as well as the application dated 17th December 2005 clearly shows that the petitioner had specifically pleaded that he was not a member of the respondent no.1 bank and therefore, the arbitral tribunal had no jurisdiction to arbitrate in respect of the dispute between him and the respondent no.1. Section 84 of the Multi State Co-operative Societies Act states that a dispute touching the constitution, management

or business of a multi state co-operative society arising between a member, a past member and persons claiming through a member, past member or deceased member and the multi state co-operative society, its Board or any officer or agent or employee of a multi state co-operative society or liquidator past or present shall be settled or decided by arbitration. Therefore, the arbitral tribunal would have the jurisdiction to try the present dispute only if the petitioner is or was a member of the respondent no.1 bank. The arbitral tribunal has not applied its mind to this defence specifically and has not decided the question: whether the petitioner is or was a member of the respondent no.1. Perusal of the interim award dated 8th May 2006 shows that the arbitral tribunal considered and dealt with the question whether the deed of guarantee was properly stamped and also dealt with the other contention of the petitioner that he stood discharged as a guarantor on resignation of the directorship. The arbitral tribunal has not specifically considered the question, whether the petitioner is or was a member of the respondent no.1 and on that account it had no jurisdiction to entertain and try the dispute. At the time of final award also the

arbitral tribunal did not frame any issue whether the petitioner is or was a member of the respondent no.1 bank and whether on that account, it had no jurisdiction to entertain and try the dispute.

7. Learned counsel for the respondent however invited my attention to the following statement in the award:

> "On the other hand, the applicant Bank Manager, filed the relevant documents i.e. membership/shareholder application and all loan documents along with his affidavit to prove the facts that the Respondent No.2 executed the Guarantee Deed and accepted the liability of the repayment of the loan."

8. In my view, the said statement is a stray statement and is not a finding that the petitioner is or was a member of the respondent no.1 bank. Arbitrator only has recorded that the manager of the respondent no.1 had filed on record the membership/shareholder application and all loan

documents. The arbitrator has not recorded whether the application was signed by the petitioner and whether the said application was accepted by the respondent no.1 bank and whether on acceptance the application the petitioner subscribed to any share capital of the respondent no.1. Therefore, the stray statement on which a reliance has been placed by the counsel for the respondent cannot be held to mean that the arbitrator has recorded any finding on the contention of the petitioner that he was not a member of the petitioner bank. If at all it is to be regarded as a finding of fact, no reasons are given in the award for it and clearly the award is a non-speaking award in that respect.

9. In my view, the very jurisdiction of the arbitral tribunal depends upon the petitioner being a member or a past member of the respondent no.1 bank. In the absence of any proof of petitioner's membership the award would have to be set aside. However, learned counsel for the respondent submits that instead of setting aside the award on that count, an opportunity may be given to the arbitral tribunal under sub-section (4) of section 34 of the Arbitration Act and further proceedings may be

adjourned to enable the arbitral tribunal to take such action as in the opinion of the arbitral tribunal, would eliminate the grounds for setting aside the award. Counsel submits that if the further proceedings are stayed, to give an opportunity to the arbitral tribunal to record a finding on the issue whether the petitioner is or was the member of the respondent no.1 bank and consequently whether the arbitral tribunal had no jurisdiction to entertain the arbitral dispute, the arbitral tribunal would record its finding to eliminate the defect. In my view, request can be granted as it would enable the arbitral tribunal to eliminate the defect. Accordingly, further proceedings are stayed under sub-section (4) of section 34 for three months to enable the arbitral tribunal to take such steps as it thinks proper.

D.G. KARNIK, J